

# Settling With History: A Hybrid Commission of Inquiry for Israel/Palestine

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It seems likely that peace in Israel/Palestine can never mean a complete separation between Israeli Jews and Palestinian Arabs. The existential proximity of the two nations, economic exigencies, and overriding geopolitical considerations may well keep them always entangled with each other. This will make mental and ideological reconciliation, on a level deeper than the decision making of political elites, an important requirement to assure the stability and resilience of peace in the region for the longer run.

—Mordechai Bar-On<sup>1</sup>

## INTRODUCTION

The project of “planning for the peace” in Israel/Palestine<sup>2</sup> has come to appear increasingly utopian in the bloody years since the Second *Intifada* began.<sup>3</sup> Despite violence, repression, and the creation of a tangle wall

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1. Mordechai Bar-On, *Historiography as an Educational Project*, in *THE MIDDLE EAST PROCESS: INTERDISCIPLINARY PERSPECTIVES* 21, 22 (Ilan Peleg ed., 1998).

2. The terms used to describe the geographical location encompassing the Israeli-Palestinian conflict have themselves historically been part of the debate. In this Note, I have chosen to use the term “Israel/Palestine” to connote the area of Israel and the Occupied Palestinian Territories (West Bank and the Gaza Strip) and to signify the unsettled nature of the boundaries within the area. The choice to use this term should not be understood as an endorsement for a particular one-state, two-state, or binational solution, but rather as a marker of the unstable nature of the geopolitical arena in which this Note functions.

3. In the wake of the breakdown at Camp David of final status negotiations between Israelis and Palestinians in July 2000, and after Ariel Sharon’s controversial, high-security visit to the area of al-Aqsa/the Temple Mount on September 28, 2000, rampant violence broke out between Israelis and Palestinians, both inside the Green Line (the pre-1967 War Israeli borders) and in the West Bank and Gaza. No consensus exists as to whether the *Intifada* (“uprising”) has ended as of the writing of this Note.

between the populations, however, avenues for discussion of the future remain—albeit sometimes reluctantly—open. Discursive turns and rhetorical flourishes have always disproportionately controlled the Israeli-Palestinian conflict. Narrative, memory, and history—the telling of the stories underneath and behind daily bloodshed—nurture combatants and victims alike. Despite the participants’ use of these tropes and dependence on their continuity, however, negotiators and officials have often glossed over their importance.

Rather than use past failures as a reason (or excuse) to halt the attempt at bilateral discussion and integrated answers, officials, civil society, academia, and the international community should seek innovative methodologies for future attempts. To blame continual failure on the conflict itself rather than the methods historically used obscures the flaws of past efforts. The process of peacebuilding complements the substance; past negotiations suffered from the consequences of unspoken background assumptions, incomplete solutions, biased proposals, and failures to recognize the crucial needs of each party. The architects of those attempts have confessed to their weaknesses; those who follow in their footsteps would be better served by remembering the warnings of the past than by championing unilateral solutions or blaming ancient grudges and contemporary hatred.

The notion of “transitional justice” has become a term of art used in legal circles to discuss the broad category of legal and extralegal mechanisms used in post-conflict situations. Extensive literature exists about post-conflict states that have found the states to be in varying degrees of legal, political, emotional, physical, and social dysfunction in the wake of gross violations of human rights. The situation and history of Israel/Palestine are ultimately dissimilar from those of other countries, yet Israel/Palestine may learn from their experiences. In addition, the international community—which has always played a powerful role in the Israeli-Palestinian conflict—will benefit from planning for the moment of transition in advance, rather than awaiting its arrival. Based on the experience of past commissions in other post-conflict states, which benefited from early policy discussions, grassroots participation, and academic contributions prior to political negotiation, this Note offers a preliminary structural suggestion for a hybrid commission, through a combination of witness testimony and academic exchange, in Israel/Palestine to investigate 1948 and the creation of the Palestinian refugee population.

The proposal offers an option in the continuing debate over how to come to terms with the competing historical narratives that inform everyday life of both Israelis and Palestinians, and pushes the theoretical and practical boundaries of the transitional justice field. Two different aspects of the time period in question support a proposal for a hybrid commission: the existential nature of the debate over 1948 for both populations, on the one hand, and the character of the two default positions regarding the “refugee ques-

tion” on the other. The default positions tend to be either rigid adherence to the definition of refugee status through international legal terms or a realist-style position that the refugees will never be allowed to return, and thus that the international legal argument is itself illusory. These unproductive arguments signal the need for new proposals. A mechanism that can foster discussion at several levels of society about 1948 and the creation of the Palestinian refugee population should be more fully explored.

The Note begins with a summary of the scholarly debates in the truth commission literature, and then highlights three case studies (El Salvador, South Africa, and East Germany) for comparative analysis, explaining how each situation can inform the discussion about Israel/Palestine. Part II discusses the importance of the moment of 1948 and the significance of framing the refugee question in innovative ways, bolstering the discussion of a hybrid commission of inquiry for Israel/Palestine with a deeper understanding of the legal and socio-psychological issues at stake. Part III briefly reviews past and present discussions of transitional justice in Israel/Palestine, foregrounding possible critiques of the proposal advanced in this Note. Finally, Part IV suggests a five-factor analytical framework for considering the structure of a commission of inquiry to investigate the events of 1948. It outlines a specific structural proposal for an Israeli-Palestinian commission, exploring how the three highlighted case studies dealt with the five factors, and ultimately proposes a hybrid commission to address 1948 and the refugees. Throughout, interviews conducted in Israel/Palestine as well as in South Africa inform the discussion.<sup>4</sup>

Although this particular proposal focuses on questions related to the formation of a hybrid commission of inquiry to address the issue of the 1948 refugees, many of the observations would be relevant to the creation of any truth commission in Israel/Palestine. The background to any peace-related proposal at this juncture remains the failure of the Oslo Accords, due not only to poor implementation, but fatal structural weakness as well. In particular, Oslo’s structure ignored both human rights violations and the centrality of narrative to resolution of the larger conflict. A more policy-oriented discussion using historical comparisons to exemplify the possibilities of a commission of inquiry may serve a pragmatic purpose in a moment when the discussion of a truth commission has, surprisingly perhaps, become possible for the first time. The exercise here—of modeling the relevance of transitional justice mechanisms for Israel/Palestine—implicitly exposes Oslo’s particular faults and explicitly highlights the background issues to the refugee question. Ironically, the Oslo process itself, particularly the Camp David II negotiations, has become another battlefield in the nar-

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4. Interviews were conducted in Jerusalem, Bethlehem, and Tel Aviv in January 2005 with the generous assistance of the Reginald Lewis Fellowship Fund at Harvard Law School.

rative war.<sup>5</sup> Without a process that recognizes these conflicting narratives—and the nationalistic, psychological, and sociological purposes they serve—the discussions about negotiations will continue to trump the negotiations themselves in an endlessly self-perpetuating cycle.

### I. TRUTH COMMISSIONS

Priscilla Hayner, in her landmark survey of truth commissions, classifies them in terms of four characteristics. Truth commissions “(1) focus on the *past*; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) [are] temporary bodies, typically in operation for six months to two years and completing [their] work with the submission of a report; and (4) are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord).”<sup>6</sup>

Truth commissions are generally “official investigation[s] into a past pattern of abuses.”<sup>7</sup> Truth commissions of varying types have been established in Argentina, Chile, East Timor, El Salvador, Guatemala, Haiti, Honduras, and South Africa, among other post-conflict societies. According to Hayner:

[They] may have any or all of the following five basic aims: to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.<sup>8</sup>

Hayner also later emphasizes that public participation in the institutional design of a commission is crucial, though this has often been overlooked in the construction of past commissions.<sup>9</sup>

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5. The dramatic events at Camp David II, and indeed, the entire Oslo process have been well documented elsewhere. Perhaps the best illustration of the ways in which the negotiations have become part of the meta-narrative of the conflict lies in the published exchange between Robert Malley and Hussein Agha on one end and Ehud Barak and Benny Morris on the other in *The New York Review of Books*. See Hussein Agha & Robert Malley, *Camp David: The Tragedy of Errors*, N.Y. REV. BOOKS, Aug. 9, 2001, available at <http://www.nybooks.com/articles/14380>; Dennis Ross & Gidi Grinstein, Letter to the Editor, *Camp David: An Exchange*, N.Y. REV. BOOKS, Sept. 20, 2001, available at <http://www.nybooks.com/articles/14529>; Benny Morris, *Camp David and After: An Exchange (1. An Interview with Ehud Barak)*, N.Y. REV. BOOKS, June 13, 2002, available at <http://www.nybooks.com/articles/15501>; Hussein Agha & Robert Malley, *Camp David and After: An Exchange (2. A Reply to Ehud Barak)*, N.Y. REV. BOOKS, June 13, 2002, available at <http://www.nybooks.com/articles/15502>; Benny Morris & Ehud Barak, Letter to the Editor, *Camp David and After—Continued*, N.Y. REV. BOOKS, June 27, 2002, available at <http://www.nybooks.com/articles/15540>.

6. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 14 (2002).

7. *Id.* at 5.

8. *Id.* at 24.

9. Hayner suggests that further thought should be given to the combined efforts of non-governmental organizations, governments, and victim communities in creating appropriate institutions. Pris-

The institutional design of truth commissions and other transitional justice models may serve the following goals: (1) easing regime change; (2) creating a sense of legitimacy in the justice sector; and/or (3) contributing to conflict management/resolution.

(1) Transitional justice assumes, by definition, a transition. The details of what a “transition” may entail will be discussed below. No matter the form, however, any version of regime change requires a mechanism (or several) to build the citizenry’s trust in the new government. In many cases, truth commissions serve this function, enabling the new regime to tangibly demonstrate its willingness to admit to the atrocities of its predecessor and, in some situations, to apologize for past violations. By making concrete recommendations that contribute to the future through a new written (integrated) history and suggestions for institutional reform, truth commissions bridge the gap between citizenry and state and ultimately provide ways in which the population can judge the state’s actions.

(2) Intimately connected to the search for a legitimate new authority is the establishment of rule of law in a post-conflict society. The institutional design of commissions may play a key role in this process if they explore the actions of all groups involved in the conflict, including the ways in which certain individuals may be both victims and perpetrators, via a process perceived to be procedurally fair.<sup>10</sup>

(3) Finally, truth commissions might, through their reconciliatory efforts, function as part of a broad peacebuilding process.<sup>11</sup> The actual work of the commission and its advance design together promote coexistence. Reconciliation is a project of generations; a commission can only aspire to contribute material and discussion to the future hope for peaceful coexistence.

Truth commissions are far from the silver bullets that supporters may originally have hoped they would be. Scholars and activists have articulated persuasive critiques of truth commissions.<sup>12</sup> Truth commissions continue, however, to fill a space neglected by other official peacebuilding and justice efforts. Building on the policy elements of truth commissions, Martha Minnow, among others, has discussed the process of testimony in therapeutic

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cilla Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 4 *LAW & CONTEMP. PROBS.* 173, 178 (1996).

10. David Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in *TRUTH v. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 99, 105–06 (Robert Rotberg & Dennis Thompson eds., 2000).

11. As defined by the U.N.’s Brahimi Report, peacebuilding “includes activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war.” The Report explicitly includes the promotion of “conflict resolution and reconciliation techniques” within its definition of peacebuilding. Panel on U.N. Peace Operations, *Report of the Panel on U.N. Peace Operations*, ¶ 13, U.N. Doc. S/2000/809, A/55/305 (Aug. 21, 2000).

12. See, e.g., Michael Scharf & Paul Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 *CASE W. RES. J. INT’L. L.* 161, 175 (2004); Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *TRUTH v. JUSTICE*, *supra* note 10, at 22; RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001).

terms, describing the “re-membering” of post-conflict society through truth commissions—allowing a society to revert to an acceptable moral balance rather than the inverted morality of a situation of systematic human rights violations.<sup>13</sup> Truth commissions share with transitional trials the establishment of a “contested national history.”<sup>14</sup> Beyond the establishment of historical accountability, the broader framework of reconciliation within which some commissions function relates closely to the recent emphasis on “restorative” rather than retributive justice. Restorative justice “assumes maximum participation of the victim, the perpetrator, and the affected members of the community, rather than sidelining these to the role of complainant, witness, or passive defendant.”<sup>15</sup> In this manner, the growth of the truth commission as a mechanism that innovates the concept of justice itself may offer a new ingredient for resolution.

To provide a starting point for discussion of the construction of a commission for Israel/Palestine, this Note will outline a series of considerations based on past examples of truth commissions, with particular attention paid to El Salvador, South Africa, and East Germany. These particular cases were chosen with certain criteria in mind: El Salvador provides the model of an internationally brokered agreement and a truth commission sponsored by the United Nations (“U.N.”). South Africa’s truth commission, famous both for its broad scope of inquiry and its promotion of the notion of restorative justice—as well as its (in)famous utilization of amnesty for political perpetrators—presents the reigning “success story” of transitional justice. East Germany, a less-discussed example, provides comparison specifically within the realm of commissions of historical inquiry, a subset of truth commissions which focus more on experts testifying about long-finished events than on contemporary victim testimony.

Truth commissions must, in the end, be domestically owned and invested with the confidence of the stakeholders. Comparison can offer points of reference for a radical new approach to the Israeli-Palestinian conflict but no previous example will fit a new context, particularly one as fraught as that of Israel/Palestine. As background, a quick survey of the circumstances of each commission will contextualize the logistical details elaborated below.

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13. Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 *FORDHAM INT’L L.J.* 429, 430 (1999).

14. “Accordingly, truth commissions, like successor trials, are a forum of public historical accountability regarding contested traumatic events, for transitions imply a displacement, or substitution, of truth regimes.” RUTI TEITEL, *TRANSITIONAL JUSTICE* 84 (2000).

15. Erin Daly & Jeremy Sarkin, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 *COLUM. HUM. RTS. L. REV.* 661, 693 (2004).

### A. *El Salvador*

After decades of military regimes, attempts at democratic reforms, and further military crackdowns, civil war began in earnest in El Salvador in 1979. Moderate dissenters who opposed the civilian-military junta that had come to power joined with leftists to form the Frente Democrático Revolucionario (FDR) while five Marxist guerilla groups formed the Frente Farabundo Martí de Liberación Nacional (FMLN). The two groups combined to form a revolutionary movement; over the next twelve years, well over 75,000 Salvadorans died due to the ravages of war and gross human rights abuses by government forces, paramilitary death squads, and guerilla activity.<sup>16</sup> In addition, over one million people (about 25 percent of the population) were displaced.<sup>17</sup> As it became clear that neither side could win the continuing civil war, and the U.N. exerted heavy pressure, the parties agreed to negotiate. The result, a series of six accords negotiated between 1990 and 1992, included the mandate for *La Comisión de la Verdad* (“Truth Commission”), which constituted the first such commission ever to be completely international in nature—both in terms of locating its mandate in an internationally brokered agreement and in terms of the composition of the Commission.<sup>18</sup>

The first innovation of the peace negotiations was the creation of an ad hoc commission to investigate military abuses. The ad hoc commission—a suggestion by the U.N. brokers—was a compromise (as was the truth commission) between the FMLN’s hope for a total purge of the military and the government’s unwillingness to engage in any criticism of the armed forces. Both parties agreed to a commission to evaluate the actions of the military officers. However, rather than scapegoat a few “smaller fish” in the military, as expected,<sup>19</sup> the commission issued a surprising report after its three-month investigation. The report, which was submitted to the President of El Salvador and the U.N. Secretary-General, called for the dismissal of 103 senior officers, including the Minister and Vice-Minister of Defense.<sup>20</sup> The conclusions of the ad hoc commission laid the groundwork for a transition to a society that respected the rule of law, beginning with direct accountability of the armed forces. After a punishing twelve-year war that centered on the impunity of the military, the ad hoc commission’s insistence that

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16. Gregory Jowdy, *Truth Commissions in El Salvador and Guatemala: A Proposal for Truth in Guatemala*, 17 B.C. THIRD WORLD L.J. 285, 293–94 (1997).

17. IAN JOHNSTONE, RIGHTS AND RECONCILIATION: UN STRATEGIES IN EL SALVADOR 12 (1995).

18. Thomas Buerghenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANS-NAT’L L. 497, 501 (1994).

19. “There is strong evidence to suggest that the government and the military only agreed to the establishment of the Ad Hoc Commission because they were convinced that it would not dare to discharge its responsibilities honestly.” *Id.* at 516–17.

20. Reed Brody, Recent Development, *The United Nations and Human Rights in El Salvador’s “Negotiated Revolution,”* 8 HARV. HUM. RTS. J. 153, 165 (1995).

senior officers be removed for their severe abuses was a remarkable statement to Salvadoran society.<sup>21</sup>

After extensive negotiations on the truth commission, it became clear that neither the government nor the FMLN trusted Salvadorans to participate as commissioners; there were worries both about the integrity of the commissioners and their personal security were they to participate in a report critical of the death squads or guerilla forces.<sup>22</sup> The U.N. therefore appointed three international commissioners, who in turn hired an entirely non-Salvadoran staff (a choice made by the commissioners after their appointment, based apparently on their belief that the general spirit of their mandate required an entirely international institution).<sup>23</sup> The mandate of the commission, limited primarily because twelve years of civil war made it wholly unrealistic to investigate *all* human rights violations, was restricted to “investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.”<sup>24</sup> Both the mandate and the final report emphasized the need to confront impunity in the military.<sup>25</sup> Because “serious acts of violence” was not a legal term and thus had no independent definition, the commissioners had to immediately define the parameters of their own mandate. The commission found that “serious acts of violence” would be defined in terms of the non-derogable rights included in the International Covenant on Civil and Political Rights and the American Convention on Human Rights, both of which were binding on El Salvador.<sup>26</sup> Additionally, violations of Common Article 3 of the Geneva Conventions or of the Second Additional Protocol to the Geneva Conventions were applicable and considered “serious acts” (i.e., taking hostages, denying due process rights, etc.).<sup>27</sup> The Salvadoran Commission distinguished itself as well by its choice to “name names” of violators in its final report and recommend their dismissal from government and military positions.<sup>28</sup>

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21. “The Ad Hoc Commission’s unanticipated decision to focus on the highest ranking officers increased the symbolic impact of its work at the same time that it heightened resistance to implementation of its recommendations. The commission’s work, though limited in scope by the time and resources available, constituted an unprecedented civilian review of the military.” Margaret Popkin, *Building the Rule of Law in Post-War El Salvador*, in *EL SALVADOR: IMPLEMENTATION OF THE PEACE ACCORDS* 10, 11 (Margarita Studemeister ed., 2001).

22. Buergenthal, *supra* note 18, at 503.

23. *Id.* at 504.

24. COMMISSION ON THE TRUTH FOR EL SALVADOR, *FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR* (1993), available at [http://www.usip.org/library/tc/doc/reports/el\\_salvador/tc\\_es\\_03151993\\_mandate.html#B](http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_mandate.html#B) [hereinafter *FROM MADNESS TO HOPE*] (last visited April 5, 2007).

25. *Id.*

26. *Id.*

27. Buergenthal, *supra* note 18, at 527.

28. Mark Ensalcado, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 *HUM. RTS. Q.* 656, 664 (1994).

### B. South Africa

Although the commissions of El Salvador and South Africa both emerged from negotiated transitions, the creation of the South African Truth and Reconciliation Commission (“TRC”) was self-consciously national in nature, in contrast to the markedly international character of the Salvadoran Commission. When the apartheid regime fell, a truth commission was determined to be the most useful method for uncovering the brutal crimes of apartheid and reconciling South African society, ultimately helping produce a peaceful transition to democracy.<sup>29</sup> After input from civil society, discussion among South African politicians and scholars, public hearings, and contributions by veterans of the Chilean and Argentinian truth commissions, the South African Parliament passed the Promotion of National Unity and Reconciliation Bill.<sup>30</sup> The TRC became famous for its public process of televised testimony and its consistent emphasis on reconciliation, privileging restorative over punitive justice, or—in some interpretations—truth over justice itself.<sup>31</sup>

Unlike the Salvadoran Commission, the TRC was proposed and implemented within South Africa, with the support of the international community. It was not a post-war initiative in the strict sense of the term, nor was it brokered by the U.N. or any other external force. Rather, the TRC emerged from a negotiated regime change, in which the apartheid government and the African National Congress agreed on a process that would grant conditional amnesty in exchange for truth-telling about gross human rights violations committed during the apartheid era.

The TRC was mandated to investigate gross human rights violations, including killing, torture, abduction, and severe ill treatment (“attempted killing and all ill-treatment forms of inflicted suffering causing *extreme* bodily and/or mental harm,” regardless if the ill treatment occurs in custody).<sup>32</sup> Therefore, the TRC did not investigate violations such as disenfranchisement, forcible transfer of people from their land, or restrictions on movement.<sup>33</sup>

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29. Charles Villa-Vicencio, *Restorative Justice in Social Context: The South African Truth and Reconciliation Commission*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 235, 237 (Nigel Biggar ed., 2003).

30. Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in *TRUTH v. JUSTICE*, *supra* note 10, at 141, 145.

31. See generally *TRUTH v. JUSTICE*, *supra* note 10. “Archbishop Desmond Tutu, the Chair of the TRC, addressed these concerns in his foreword to the Final Report, emphasizing the need to understand justice as restorative and reconciliatory rather than punitive.” *TRUTH AND RECONCILIATION COMM’N, I TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT* 9 (1998).

32. *TRUTH AND RECONCILIATION COMM’N, V TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT* 16 (1998).

33. As will be discussed below, the limitation of the TRC’s mandate to investigate only gross human rights violations rather than the structural violence of apartheid has affected impressions of its efficacy and inspired critiques of its instantiation of social inequality. See Mahmood Mamdani, *The Truth According to the TRC*, in *THE POLITICS OF MEMORY: TRUTH, HEALING, AND SOCIAL JUSTICE* 176 (Ifi Amadiume & Abdullahi An-Na’im eds., 2000).

Beyond exposing details of gross human rights violations, the TRC report focused primarily on reconciliation, privileging truth over punitive justice, and resting responsibility on individual members of society rather than on faceless institutions. The report defined four levels of truth: (1) factual/forensic truth (documenting provable scientific evidence); (2) personal and narrative truth (emphasizing the need for individuals to be given the space to express their own oral histories and for the history of the society to be written partially from the perspective of the many individuals who suffered during that era);<sup>34</sup> (3) social truth (addressing the need for reaching truth through dialogue and open discussion); and (4) healing and restorative truth (locating facts within relationships among citizens and between the state and its citizens).<sup>35</sup>

The last significant aspect of the TRC's report, for the purposes of comparison, was the investigation into human rights violations perpetrated by members of the insurgent organizations. The African National Congress and the Pan-African Congress were investigated along with the government, raising issues of just war ideology and legitimate resistance against an unjust regime, but also declaring blanket condemnation of all human rights abuses, regardless of their context or perpetrator.<sup>36</sup> This section of the report traces the cyclical relationship between the actions of the national liberation movement and repressive governmental responses.<sup>37</sup> The report combines amnesty applications, testimony of gross human rights violations, and secondary sources to create its narrative. Two crucial areas remain part of the TRC's "unfinished business" today: lack of prosecutions for those who did not apply for, or were denied, amnesty from the TRC and inadequate reparations for victims of gross human rights violations identified by the Commission.<sup>38</sup>

### C. Germany

A separate methodology investigates human rights abuses that took place many years earlier. These commissions of historical inquiry are contemporary state-sponsored inquiries into violations committed by a past government. They generally take place a significant period after the transition

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34. "[The Commission] also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless . . . the Commission sought to recover parts of the national memory that had hitherto been officially ignored." TRUTH AND RECONCILIATION COMM'N, I TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 112 (1998).

35. *Id.* at 110–14.

36. TRUTH AND RECONCILIATION COMM'N, II TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 1–393 (1998).

37. Volume II of the Final Report of the South African TRC details the history of, and human rights violations committed by, the ANC and PAC; it discusses these in the context of the apartheid regime, recognizing the movement's legitimate struggle against humanity. *Id.*

38. See generally TRUTH AND RECONCILIATION IN SOUTH AFRICA: 10 YEARS ON (Charles Villavicencio & Fanie Du Toit eds., 2006).

from one regime to another and—rather than condemning recent members of government—often “clarify historical truths and pay respect to previously unrecognized victims or their descendants.”<sup>39</sup> They tend to deal with lesser-known incidents, like practices targeted against minorities, rather than addressing the widespread atrocities or societal repression explored by other truth commissions.

In 1992, the German Parliament formed the Commission of Inquiry for the Assessment of History and Consequences of the SED (Socialist Unity Party) in Germany.<sup>40</sup> Mandated to investigate and document practices of the German Democratic Republic (“GDR”) from 1949 to 1989, the German model relied primarily on the presentation of papers by historians, with the specific mandate to

conduct political-historical analysis and make political-ethical assessments of the structure and practices of the SED party; the human rights violations and environmental degradation that resulted; violations of international human rights conventions and norms, including political, mental and psychosocial repression; the role of ideology in education, literature, and daily life; the role of the opposition movement; church-state relations; the independence of the judiciary; and relations between West and East Germany.<sup>41</sup>

Some victims and representatives of groups who had experienced particular repression under the GDR also provided testimony.

The context of the German Commission differed significantly from that of other truth commissions for many reasons, including the relatively fewer incidences of physical violence and the particular, insidious nature of the abuses perpetrated by the East German state.<sup>42</sup> For instance, the state’s abuses included prohibitions against working and studying, and the constant harassment by authorities that produced an environment of fear, and extraordinary limitation on freedom of expression or speech.<sup>43</sup> The commission consisted of thirty-six members, twelve of whom were experts from outside the German Parliament, primarily historians.<sup>44</sup> Including a massive academic component, the commission solicited over one hundred papers on myriad topics, most by academics using old *Stasi* (East German secret police) files.<sup>45</sup>

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39. HAYNER, *supra* note 6, at 17.

40. JAMES MCADAMS, JUDGING THE PAST IN UNIFIED GERMANY 90 (2001).

41. *Id.* at 61.

42. HAYNER, *supra* note 6, at 61.

43. MCADAMS, *supra* note 40, at 12–16, 113.

44. HAYNER, *supra* note 6, at 61.

45. “An important part of the process was to solicit expert academic opinion. Altogether, 148 reports were commissioned on ninety-five questions. The author of each report was asked to present the problematological dimensions of the issue on the basis of the latest research and the archival material that had recently become accessible.” Hermann Weber, *Rewriting the History of the German Democratic Republic*.

The papers were presented at over forty public hearings. The commission did not possess subpoena power and senior government officials declined to testify when invited, perhaps out of fear their testimony would be used against them in the future. The commission did not primarily take testimony, but “over one hundred ‘contemporary witnesses,’ including representatives of victims’ assistance organizations and a number of victims themselves, gave accounts of suffering and repression in these public hearings.”<sup>46</sup> The enacting statute states that the “mode of operation” shall include, among other things: “discussions with interested parties and citizens’ groups on site; dialogue with scientists, scholars, and grass-roots groups which work through GDR history; public hearings and forums; commissioning of presentation of expert assessments and scholarly studies.”<sup>47</sup> Among other documents, the 1994 final report recommended the creation of another body, eventually called the Commission of Inquiry on Overcoming the Consequences of the SED.<sup>48</sup> The additional commission addressed many issues similar to those of the first, but it was also charged with looking into other areas, “such as the economy, education, and daily life in East Germany and the impact of unification . . . .”<sup>49</sup>

## II. THE REFUGEES AND TRANSITIONAL JUSTICE MECHANISMS

This Note suggests that the lessons learned from these prior examples may be applied in innovative ways to the Israeli-Palestinian conflict. Before detailing the specific proposal herein, certain conceptual points must be addressed. First, the refugee question—and the entire story of 1948—represents a blockage point for Israeli-Palestinian negotiations. As has been noted by Gershon Shafir and others, this does not imply that the refugee question is unsolvable, but it may require, as Gershon Shafir and Ilan Pappé have discussed, a comprehensive solution encompassing both “visible” material and “invisible” fairness and justice aspects.<sup>50</sup> However, the perception of the irreconcilability of the refugee question may itself serve to reify the idea that it provides the foundation for the conflict’s intractability.

Second, and inextricably linked, the refugee question represents an existential dilemma for both nations. The Palestinian nation is partially con-

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*lic: The Work of the Commission of Inquiry, in* REWRITING THE GERMAN PAST: HISTORY AND IDENTITY IN THE NEW GERMANY at 197, 204 (Reinhard Alter & Peter Monteath eds., 1997).

46. HAYNER, *supra* note 6, at 62.

47. NEIL KRITZ, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 219 (1995).

48. HAYNER, *supra* note 6, at 62.

49. *Id.*

50. Gershon Shafir, *Reflections on the Right of Return: Divisible or Indivisible?*, in EXILE AND RETURN 297, 298 (Ann Lesch & Ian Lustick eds., 2005); Ilan Pappé, *The Visible and Invisible in the Israeli-Palestinian Conflict*, in EXILE AND RETURN 279, 279 (Ann Lesch & Ian Lustick eds., 2005).

structed around *al-Naqba*<sup>51</sup> and the experience of exile.<sup>52</sup> Israeli Jews view the existence of the Palestinian refugees (and their insistence on a legal right of return) as a demographic threat to the continuation of Israel as a Jewish state as well as an implicit, continuing challenge to the state's legitimacy. As one Israeli psychologist has written, "[T]he Palestinian claim [to return] was perceived as a threat to the Jews' independent existence, survival, and morality. In other words . . . the Israeli Jews could not cope with the implications of the Palestinian demand that past wrongdoing be recognized."<sup>53</sup> The historical debate alternates between two poles: one that claims that Israel deliberately ethnically cleansed the indigenous population in 1947-48 to form a majority Jewish state, and the other argues that a combination of Arab governmental encouragement and Palestinian choice motivated the massive flight of the Palestinians during the war.<sup>54</sup> This extensive academic and political discussion has translated into a familiar legal debate over whether the Palestinian refugees of 1948 have a right of return to Mandatory Palestine.<sup>55</sup>

To argue for the repatriation of refugees in this particular context has required a legal argument within the scope of international refugee law. Yet international law cannot encompass the full claims of the refugees, even if the right of return were to be recognized. The legal argument stands in for

51. *Naqba*, or "catastrophe," is the common Arabic term Palestinians use to describe the events of 1948.

52. The Palestinian relationship with 1948 has been broadly discussed. Rashid Khalidi, a leading Palestinian historian, stated that any official Israeli response to the refugee question must acknowledge "the existential hurt that was done to the majority of the Palestinian people . . . by those who caused that hurt, or their successors in power." Rashid Khalidi, *The Palestinian Refugee Problem: A Possible Solution*, PALESTINE-ISRAEL JOURNAL, Autumn 1995, 74, quoted in Ian Lustick, *Negotiating Truth: The Holocaust, Lehavdil, and al-Nakba*, in EXILE AND RETURN, *supra* note 50, at 106, 124. See also Randa Farah, *Words and Worlds: The Dream-Right of Palestinian Refugees*, 8 NEXUS 137, 140-41 (2003).

53. Dan Bar-On, *Will the Parties Conciliate or Refuse? The Triangle of Jews, Germans, and Palestinians*, in FROM CONFLICT RESOLUTION TO RECONCILIATION 239, 244 (Yaacov Bar-Siman-Tov ed., 2004). Explains one scholar:

[For many Israeli Jews] 1948 is seen as the epitome of cosmic justice. It's the turning point. It's where, after the Holocaust, the Jewish people, at their best, finally get control. And it really can only be conceived as a positive event . . . [F]or these people, to approach them and say, well, actually no—what happened in 1948 is actually the demise of other people, it was unjust for them, it was cruel to them, it was morally cruel . . . is something that brings up too much . . . So for them, the guilt of what actually happened . . . is being compounded by the guilt of never really being prepared to talk about it, to think about it . . .

Interview with Dan Rabinowitz, Professor of Anthropology, Tel Aviv University, in Tel Aviv (Jan. 7, 2005).

54. See generally BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED* (2004); THE ISRAEL/PALESTINE QUESTION (Ilan Pappé ed., 1999); ILAN PAPPE, *THE ETHNIC CLEANSING OF PALESTINE* (2006).

55. Mandatory Palestine, administered by the British from 1920 to 1947, encompassed the current state of Israel, as well as the Palestinian Territories. See generally LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* (1998); PALESTINIAN REFUGEES: THE RIGHT OF RETURN (Naseer Arufi, ed., 2001); Yoav Tadmor, *The Palestinian Refugees of 1948: The Right to Compensation and Return*, 8 TEMP. INT'L. & COMP. L.J. 403 (1994); Matthew Kalman, *The Palestinian Right of Return in International Law—The Israeli Perspective*, 8 NEXUS 43 (2003); Justus R. Weiner, *The Palestinian Refugees' 'Right to Return' and the Peace Process*, 20 B.C. INT'L & COMP. L. REV. 1 (1997).

a host of psychological, historical, and narrative demands about acknowledgement and apology. A mechanism must be found that will circumvent the exclusively legalistic language of rights discourse and encompass the requirements of narrative, history, reparations, and repair. In light of the need for alternate mechanisms and innovative approaches to the refugee question, this Note joins the small chorus of recent voices suggesting the use of transitional justice mechanisms—in addition to legal decision making on the right itself—to circumvent the traditional obstacles created by a narrow legal or political focus on the refugee question.

More broadly, significant work in the social-psychological field has laid the foundation for arguments regarding the importance of history to the reconciliation or coexistence of Israelis and Palestinians. Examining the identity claims of Israelis and Palestinians, Herbert Kelman outlined five necessary stages for achieving “identity revision” and, subsequently, reconciliation: (1) mutual acknowledgement of the other’s nationhood and humanity; (2) development of a common moral basis for peace, with a peace process that can be viewed as “consistent with the principles of fairness and justice for both sides”; (3) confrontation of history; (4) acknowledgement of responsibility; and (5) establishment of patterns and institutional mechanisms of cooperation.<sup>56</sup>

Extending the social-psychological lens into the peacebuilding sector leads to the question of whether a mechanism or institution may assist in the process Kelman describes. This Note argues that a hybrid commission of inquiry, particularly regarding the central identity-point of 1948, may contribute to the necessary stages of identity revision. Discussing the need for transitional justice mechanisms in Israel/Palestine, particularly with regard to the Palestinian refugees, two eminent scholars state that:

[C]onsiderations of historical justice are essential for achieving reconciliation in the Israeli-Palestinian (like any other) conflict . . . . We believe this could be achieved on the basis of a conception of justice that is not merely *corrective* or *compensatory*, but rather *transformative*.<sup>57</sup>

In the Israeli-Palestinian context, transformation requires the examination and reformulation of narrative itself.<sup>58</sup> Underneath statistics of deaths on

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56. Herbert Kelman, *Reconciliation as Identity Change: A Social-Psychological Perspective*, in FROM CONFLICT RESOLUTION TO RECONCILIATION 111, 123 (Yaacov Bar-Siman-Tov ed., 2004).

57. Yoav Peled & Nadim Rouhana, *Transitional Justice and the Right of Return of the Palestinian Refugees*, 5 THEORETICAL INQ. L. 317, 319–20 (2004).

58. One interviewee emphasized that it is necessary to consider material need and broad social change in addition to narrative:

“We have enough narratives . . . . We need acknowledgement, we need to overcome denial in both societies, and we need to build mechanisms for resettlement, for compensation, and for acknowledgement . . . . If Israelis knew that saying they were sorry would bring peace and an end to claims for return, they would say they were sorry. If Palestinians knew that telling their story would bring them justice or material change, they would tell their story.”

each side, cyclical violence, and human rights violations over the last century lies a conflict over identity, existence, and claims to history. Each side of the equation must be addressed in a peace process; without attention to history, no negotiation over land, settlements, water, or other tangible issues will succeed.<sup>59</sup> Avoiding narrative and historical justice has failed in the past. If any lesson has been learned, it should be the need to reexamine these crucial underpinnings to the seemingly more tangible claims.

### III. GROUNDING THE FRAMEWORK

Even in the midst of hopelessness on the ground, a continuing discussion of transitional justice mechanisms may itself help to foster transition. Despite recent preferences of both Israelis and Palestinians for seemingly unilateral solutions, eventual cooperation will be necessary for two peoples who remain neighbors—no matter what attempts they may make to avoid that characterization. In South Africa, intensive debate as to the structure of a possible commission preceded the eventual creation of the TRC. Similarly, in Israel/Palestine, scattered grassroots dialogue groups and current scholarship have slowly begun to address the questions involved in the formation of a commission of inquiry. To that end, this section of the Note suggests a hybrid commission for the investigation of 1948, with a focus on the Palestinian refugees. The commission would be developed during an internationally brokered peace negotiation and would ideally have a mandate covering the years 1945 to 1950. A combination of historical academic exchange and individual testimony would be the ideal structure, resulting in a report, recommendations, and a poly-vocal history that could function for either adults (in moving the populations toward coexistence) or children (by creating a baseline for new history textbooks, a crucial aspect of promoting humane coexistence).

This proposal has clear limitations. First, any suggestion of a particular institutional structure will inevitably prioritize some claims over others.<sup>60</sup> In particular, a focus on the years of 1945 to 1950 excludes much of the larger context of the Zionist movement, the Palestinian experience during the mandate, and concerns about expulsions of Jews from various Arab countries. Including academic exchange should alleviate this burden to

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Interview with Daphna Golan-Agnon, Senior Researcher, The Minerva Center for Human Rights, Hebrew University, in Jerusalem (Jan. 17, 2005).

59. In a bow to this concept, the Geneva Accord emphasizes the need for reconciliatory mechanisms in addition to compensation and resettlement. The Accord specifically mentions historical narrative and mutual understanding about the events of 1948. Geneva Initiative, *The Geneva Accord: A Model Israeli-Palestinian Peace Agreement*, art. 7.14(i), Dec. 12, 2003, available at <http://www.geneva-accord.org> (follow "The Accord" hyperlink).

60. Thanks to Leora Bilsky for her sophisticated discussion of the need to focus on procedure in both trials and truth commissions in order to understand the voices and stories that will inevitably be left out of the narrative. Interview with Leora Bilsky, Professor of Law, Tel Aviv University, in Tel Aviv (Jan. 5, 2005).

some degree. However, rather than attempting to investigate the entire history of the conflict in one structure, this Note suggests narrow temporal and spatial parameters for investigation.

Second, this Note does not discuss compensation or reparation in detail, nor does it take a particular stance on the legal or policy debates over the right of return. For many, this may undermine the apparent purpose of the project, reducing it to no more than an intellectual exercise devoid of practical import. Even were it implemented, such a commission would be trapped in a series of questions regarding inevitable trade-offs among material needs (compensation, relocation, and restitution) and psychological ones (memorialization and healing). Adequate compensation cannot allow avoiding the means for healing the past, nor can creating a mechanism to heal the past balance an unjust material solution.<sup>61</sup> As discussed, however, neither the suggestion, institutional design, or implementation of such a commission is meant to fulfill every expectation. If anything, this conflict now requires broadly optimistic ideas tempered by narrowly drawn expectations.

Third, no truth commission has ever been designed to address a two-state situation. If a final agreement permanently creates a two-state solution, a commission will encounter a series of difficulties different from those in situations of civil conflict. Although this challenge is considered seriously, the proposal attempts to push the boundaries of the transitional justice literature. Finally, because the commission depends upon an internationally brokered accord, the entire discussion might appear utopian. Recent developments have made everyone more skeptical about peace, but the perception that the resolution of an intractable conflict seems impossible should not create a self-perpetuating refusal to suggest (partial) solutions.<sup>62</sup> Despite the recent election of Hamas in the Palestinian Territories, with its concomitant consequences in Israel and the international community, the discussion remains relevant. Regardless who is elected in either Israel or Palestine, many voices remain silent—in particular, those of the refugees outside the entire territory. Refusing to address the future cannot be the answer to an impossible present.

In 1996, a roundtable on truth commissions at Harvard Law School included a brief discussion on the idea of a truth commission for Israel/Palestine. Although addressed in some detail, the conclusions reached seemed to dismiss the possibility of such a commission.<sup>63</sup> By contrast, a collection of

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61. This argument was raised more articulately than phrased here by Israeli political scientist Joel Peters. Interview with Joel Peters, Professor of Political Science, Ben Gurion University, in Jerusalem (Jan. 16, 2005).

62. Golan-Agnon, *supra* note 58.

63. In response to the moderator's question about the viability of such a mechanism in the context of Israel/Palestine, Israeli political scientist Yael Tamir dismissed its utility with the idea that individual stories would not serve the broader interest in achieving an abstract acknowledgement of injustice conducted by both Israelis and Palestinians. Palestinian political scientist Fateh Azzam agreed with

essays published in 2005 re-frames the refugee issue altogether, raising questions of truth, reconciliation, reparations, apology, and the utility of transitional justice as a useful model to consider for resolution.<sup>64</sup> Nearly a decade since the discussion at Harvard, the situation on the ground seems increasingly desperate, but the conceptual options for transition and settlement have expanded.<sup>65</sup>

Recently, a small group of Israeli and Palestinian academics met to discuss the possibility of using the truth commission model. They formulated a plan for an Israeli-Palestinian Historical Commission (“IPHC”), a commission of inquiry based on academic interchange to investigate the 1948 War in conjunction with the Arab uprisings of 1936 to 1939, and the 1967 War in conjunction with the 1987 *Intifada*. Although it yielded a preliminary proposal, the conference disintegrated internally, resulting in documentary memory of the event but no practical action.<sup>66</sup> The proposal, the only attempt known thus far to formulate a commission regarding 1948, was limited to academic research and did not include victim testimony. Though a courageous attempt to bridge competing narratives, it nonetheless teetered on the edge of the cliff toward scholarly irrelevance.

In no way are these attempts unimportant—some of the best work on the conflict has arisen from attempts to reconcile competing histories.<sup>67</sup> In fact, such scholarship, accompanying dialogue, and working groups lay the groundwork for a larger process. The supposition of this Note, however, is that reconciliation among historians, while crucially important and irreplaceable, is insufficient. The work to create an IPHC suggests regional interest in and curiosity about the possibility of importing the lessons of past truth commissions into the Israeli-Palestinian sphere. However, it also highlights the limitations of the proposal. The specificity of the model pro-

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Tamir that “naming names” in Israel/Palestine would not be useful, but he emphasized the “urgency of dealing with issues of past injustices.” He expressed little confidence in the idea of a truth commission, however, particularly given the political moment, when the fragile peace process was already exhibiting its fissures. *TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT* 76–80 (Henry Steiner ed., 1997).

64. *EXILE AND RETURN*, *supra* note 50, 290, 309–12. The academics involved in this publication met in 2002 and 2003 to discuss the formation of a historical commission. Although the conference failed to come to a resolution as to the actual creation of such a commission, it demonstrated a shift during the 1997–2005 period in the discussion of transitional justice models for Israel/Palestine. Conversation with Gershon Shafir, Professor of Sociology, University of California, San Diego, in Washington, D.C. (Nov. 20, 2005).

65. See Matthew A. Weiner, Note, *Defeating Hatred with Truth: An Argument in Support of a Truth Commission as Part of the Solution to the Israeli-Palestinian Conflict*, 38 *CONN. L. REV.* 123 (2005). Weiner’s subject relates to my own, but his Note defends in broad strokes the utility of a truth commission in Israel/Palestine to address a variety of issues over the time period of the entire conflict. See also Laurie King-Irani, *To Reconcile, or to be Reconciled?: Agency, Accountability, and Law in Middle Eastern Conflicts*, 28 *HASTINGS INT’L & COMP. L. REV.* 369 (2005); see also Peled & Rouhana, *supra* note 57, at 238. While eschewing the normative policy suggestions made in this Note, Peled and Rouhana provide an excellent theoretical basis for the reasons a commission of inquiry would be useful in the case of the 1948 refugees.

66. Beshara Doumani & Gershon Shafir, Israeli-Palestinian Historical Commission Project (2005) (unpublished report, on file with author); Shafir, *supra* note 64.

67. See, e.g., *SHARED HISTORIES: A PALESTINIAN-ISRAELI DIALOGUE* (Paul Scham et al. eds., 2005).

posed in the document<sup>68</sup> and the sad account of how the first attempt collapsed during the Second *Intifada* reinforce cynicism regarding solutions, particularly to the refugee question.

The literature and interviews conducted demonstrate that the right of return as a phrase encompasses not only a legal argument, but also a demand for recognition on behalf of the refugees. The director of Dheisha refugee camp's cultural center explained that the right of return for him means "the right to choose where to live, not to be forced to live in one place or another. The right of return means the ability to live freely."<sup>69</sup> For him, the state of refugeehood bespeaks a temporary existence; despite his birth and life in Dheisha camp, he craves the right to return to his father's village of Zakkariya.<sup>70</sup> Without this right, he indicated, his existence continues barren of complete happiness or any possibility of permanence.<sup>71</sup> The personal, expansive ways in which the right of return is articulated belie dry legalistic definition. This proposal does not presume to detail the implementation of a right of return nor to address how a final accord can be brokered regarding this question. Rather, the discussion surrounding a commission of inquiry can highlight alternative methodologies for understanding the plight of the Palestinian refugees in a way that may escape the debate's stale rhetoric. A commission could provide an opportunity for the voices of the refugees to be heard and could be incorporated into a larger process to address the legal question of the right of return.

#### IV. THE PROPOSAL

##### A. Analytic Framework

The analytical framework discussed below was developed specifically with Israel/Palestine in mind. In comparing the three case studies of El Salvador, South Africa, and East Germany, five main factors emerged as relevant to designing a commission of inquiry for Israel/Palestine. The framework utilizes the following factors: (1) the circumstances of transition; (2) the mandate of the commission; (3) public support; (4) economic considerations; and (5) the role and format of the final report. Significant factors in the truth commission literature are removed from this rubric; the question of amnesty, for example, critical to the discussion in the aftermath

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68. Doumani & Shafir, *supra* note 66.

69. Interview with Ziad Abbas Shamrouch, in Dheisha Refugee Camp, near Bethlehem (Jan. 12, 2005). Established shortly after the exodus and expulsion of Palestinians in 1948 from villages in what today is called Israel, Dheisha refugee camp is located near Bethelem in the West Bank. The Ibdaa center runs multiple projects, including educational programs, a dance troupe, basketball, and others, for the residents of the camp.

70. *Id.*

71. *Id.*

of the South African TRC, has not been included.<sup>72</sup> The factors included here emphasize procedural concerns particular to Israel/Palestine to chart a path toward pragmatic policy models.

1. *Transition* relates closely to the unique nature of an expected Israeli-Palestinian-brokered solution. Whether it results in a two-state solution under the Roadmap or a similar agreement, or in a binational or one-state solution, the transition from a situation of two distinct nations with oppositional visions for state-building will play a key role in any commission.

2. The commission's *mandate* should be viewed as an aspect central to institutional design. Both those who contribute to constituting the mandate and the text itself will shape the direction and actions of the commission.

3. *Public support*, particularly in a conflict that has been dominated by spoilers, must be considered. Corraling public support will require separate actions for each population, targeted at their different fears and hopes. While Israelis fear that apologizing threatens Israel's legitimacy as a nation-state, Palestinians fear that a commission will be another placatory measure that does not bring concrete improvement.

4. *Economic considerations* relate intimately to the concern for real change. Without an understanding of the broader economic context and the decline in the Palestinian economy since the Second *Intifada* began (exacerbated by Hamas' electoral victory), peacebuilding exercises cannot succeed.

5. The *final report* is the commission's tangible legacy. Although the process of preparing and participating in the work of the commission should have an impact on the populations involved, future generations (for whom the teaching of history may be most crucial) will learn from the written record. In order to avoid the "Oslo syndrome," in which the failure of negotiations becomes part of the conflict narrative, the commission must succeed in its greater goal of writing a poly-vocal and anti-reductionist history.

## B. *Applying the Framework*

This section details the proposed hybrid commission of inquiry for Israel/Palestine. As each factor is outlined, comparative points from the highlighted case studies are presented before suggesting how a commission in Israel/Palestine would be designed.

### 1. *Transition*

In South Africa, despite a certain level of legal continuity, the regime itself changed dramatically: the apartheid system was undermined, a demo-

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72. The dangers of retroactive prosecution, the legal complexity of investigating decades-old crimes, and the practical consideration that prosecutions for actions committed during the 1948 era are unlikely make the discussion of amnesty inappropriate here.

cratic regime installed, and constitutional negotiations took place.<sup>73</sup> By contrast, in El Salvador, although the peace agreements mandated governmental reform, they emerged from a stalemate between the state and the rebel FMLN coalition, and thus did not foster immediate radical governmental change.

In many ways, a dramatic transition makes the process of creating a commission simpler, because the successor regime is often eager to create an official narrative of the violations of the preceding government. Due to this impulse, however, commissions created in such an environment more easily fall prey to creating an “official history” that over-simplifies the complexities of the violations committed by both governmental and anti-governmental forces.<sup>74</sup> Even in South Africa, with its paradigmatic truth commission, recent scholarship has raised questions as to the history written by the TRC.<sup>75</sup> In his Minority Position upon resigning from the TRC, Wynand Malan stated that, “A shared understanding of our history requires an understanding of different perspectives, not the building of a new national myth. Presenting ‘the truth’ as a one-dimensional finding is a continuation of the old frame.”<sup>76</sup> According to some critics, Germany’s government used its commission—which took place within the dramatic transitional moment of reunification—to create an official history that discounts the Communist past of the GDR.<sup>77</sup>

By contrast, in a regime that has not experienced a substantial change of institutional actors, the same actors that are named in or implicated by the final report of the commission may be bound to implement its recommendations.<sup>78</sup> This problem is more likely to occur in Israel/Palestine, where those who participated in the events of 1948 remain influential in public life. However, in any transition, sudden or gradual, the regime and the public must address the changes in what Ruti Teitel describes as the “truth” regime, i.e., the politics of constructing national and state historical narratives.<sup>79</sup> In a society that has not undergone radical change, a commission must address concerns about the implementation of its recommendations. The commission must also anticipate the particular difficulties of fostering “transitional justice” in a society that has not fully ex-

73. Johnny de Lange, *The Historical Context, Legal Origins and Philosophical Foundations of the South African Truth and Reconciliation Commission*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 17, 17–19 (Charles Villa-Vicencio and Wilhelm Verwoerd eds., 2000).

74. Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in TRUTH v. JUSTICE, *supra* note 10, at 261, 265.

75. See generally WILSON, *supra* note 12.

76. TRUTH AND RECONCILIATION COMM’N, *supra* note 32, at 442.

77. Geoff Eley, *The Unease of History: Settling Accounts with the East German Past*, 57 HIST. WORKSHOP J. 175, 180–83 (2004).

78. JOHNSTONE, *supra* note 17, at 37; Buergenthal, *supra* note 18, at 510.

79. TEITEL, *supra* note 14, at 70.

perienced transition and which partially depends upon the mechanism for its transition.

If there is no “full” transition in Israel/Palestine, the commission will differ significantly from those in other post-conflict societies. If a commission is derived within the context or after the conclusion of a peace treaty that creates a two-state solution, as the current framework suggests it would be, it is unlikely that the Israeli or Palestinian leadership or governmental structure will dramatically change. A negotiated peace accord brokered by international players—likely the Quartet, which comprises actors trusted and distrusted by both Israelis and Palestinians<sup>80</sup>—may be the optimal instrument to mandate a commission of inquiry. As in El Salvador, such a mandate would allow the parties to escape the stasis of cyclical violence. It would demonstrate both international support for the effort and recognition by the elite actors involved that 1948 must be directly confronted. In his discussion and critique of the Camp David II talks—the most contested of the many negotiations during the Oslo process—Palestinian negotiator Omar Dajani cites the failure to discuss history as a key element in the miscommunications between Israelis and Palestinians. For Palestinians, he explains:

[t]he peace process represented an opportunity not only to establish control over their own lives in their own independent state but also obtain recognition—and validation—of the legitimacy of their national narrative. From the start of permanent-status negotiations, however, Israelis expressed impatience with discussions about the past, arguing that they are a waste of time and would only deepen enmity between the parties.<sup>81</sup>

Dajani quotes Israeli Attorney General Elyakim Rubinstein, who declared that, “What happened in 1948 is the subject of controversy, and the peace process shouldn’t be the arena in which historical truth is pronounced.”<sup>82</sup> Thus, the discussion of history, particularly within the context of a peace process, becomes another field for battle. If a peace process included the mandate for a commission, it might relieve the tension of discussing the history, while reassuring Palestinians that it has not been removed from the table.

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80. The Quartet—the United States, U.N., European Union, and Russia—has sponsored A PERFORMANCE-BASED ROADMAP TO A PERMANENT TWO-STATE SOLUTION TO THE ISRAELI-PALESTINIAN CONFLICT (Apr. 30, 2003), available at <http://www.un.org/News/dh/mideast/roadmap122002.pdf>.

81. Omar Dajani, *Surviving Opportunities: Palestinian Negotiating Patterns in Peace Talks with Israel*, in HOW ISRAELIS AND PALESTINIANS NEGOTIATE: A CROSS-CULTURAL ANALYSIS OF THE OSLO PEACE PROCESS 39, 69 (Tamar Cofman Wittes ed., 2005).

82. *Id.*

Unlike in El Salvador, in Israel/Palestine there may be resistance to an international peacekeeping or monitoring presence.<sup>83</sup> Nonetheless, some measure of international intervention may be necessary to create a sustainable peace process,<sup>84</sup> while also supporting a commission of inquiry. Ideally, the international presence would help stabilize the situation and build the confidence of both populations while allowing the work of the commission to move forward.

## 2. *The Mandate*

The South African TRC was created by implementing national legislation after prolonged consultation among lawmakers and the public. A grassroots effort of epic proportions, the TRC represented a completely national effort with entirely South African commissioners. Even the construction of the commission itself took place in full view of and with participation by the public.<sup>85</sup> Although the conditional amnesty was negotiated among elites, the mechanism to achieve it—the TRC—was the product of a wider consultation process. By contrast, El Salvador's commission was created by an international accord during elite-level negotiations and peopled by an entirely international staff. The German commission, formed after the *Stasi* files were opened to the public, "followed the established guidelines for parliamentary commissions of inquiry in Germany, with political parties represented equivalent to their representation in Parliament."<sup>86</sup>

In addition to the procedural formulation of the mandate, every commission must contend with the substantive aspects of the mandate. Hayner suggests that the mandate of a commission should be both appropriate to the context and flexible enough that commissioners may exercise a degree of discretion in their interpretation of their investigative parameters.<sup>87</sup> The TRC's mandate in South Africa was temporally broad, included a variety of gross human rights violations, and aimed to tell the story of apartheid through an extraordinary amount of victim and perpetrator testimony.<sup>88</sup> In

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83. See Maria Stephan, *The Case for Peacekeeping in the Occupied Palestinian Territories*, 11 INT'L PEACEKEEPING 248, 259 (2004).

84. The Geneva Accord proposes a multinational force to "provide security guarantees to the Parties, act as a deterrent, and oversee the implementation of the relevant provisions of this Agreement." This clause signals the growing recognition of the need for third party security intervention. Geneva Initiative, *supra* note 59, art. 5.

85. Priscilla Hayner, *Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide*, in LOOKING BACK, REACHING FORWARD, *supra* note 73, at 32, 38. More recently, critiques have been raised regarding the participatory nature of the decision process. See, e.g., Rashida Manjoo, *The South African Truth and Reconciliation Commission—A Model for Gender Justice?*, in GENDERED PEACE: WOMEN'S STRUGGLES FOR POST-WAR JUSTICE AND RECONCILIATION (Donna Pankhurst ed., forthcoming 2007). Nevertheless, general consensus remains that the construction of the TRC included far more civil society consultation than that of any other truth commission thus far.

86. HAYNER, *supra* note 6, at 61.

87. Hayner, *supra* note 9, at 179.

88. Promotion of National Unity and Reconciliation Act 34 of 1995, available at <http://www.doj.gov.za/trc/legal/act9534.htm>.

the midst of the TRC hearings, the commissioners found that institutional involvement had not been appropriately addressed and so included a series of institutional hearings toward the end of the process, receiving testimony and submissions from the business community, the military, and other sectors of apartheid society.<sup>89</sup>

El Salvador's truth commission, by comparison, operated within a mandate restricted to investigating "serious acts of violence."<sup>90</sup> The commissioners, using the broad powers explicitly granted them to interpret their specific duties, defined the parameters of their own investigation. Although the commissioners defined "serious acts" relatively broadly according to international human rights conventions, the commission still failed to address significant concerns, including the activity of the notorious death squads.<sup>91</sup> Due to the substantively different context of the German Commission of Inquiry, its mandate focused on the corrosive nature of East Germany's institutions and their effects on the daily lives of East Germans.<sup>92</sup> In the words of one historian, it attempted to "cement a democratic consciousness and to foster a common political culture for the whole of Germany . . . . [Its task] was to proffer contributions to political and historical analysis and to the moral evaluation of politics."<sup>93</sup>

The formula of a hybrid commission for Israel/Palestine would combine academic papers presented in public fora with direct testimony from refugees and other concerned individuals and organizations related to the events of 1948. This would create a platform to make contradictory narratives available to all players. Testimony is limited by time constraints because the generation of 1948 refugees will shortly "age out" of testifying, making it paramount that the commission take place soon. Commissioners would need to travel to Palestinian refugee communities outside Israel/Palestine, particularly to Lebanon and Jordan, and also to document stories of Jewish experiences during the relevant time period. Commissioners would interview individuals in the field and record their stories, with the aim of eventually making recommendations regarding how to tell the story of 1948 and the political ramifications of dealing with the refugee question today. As inevitably occurs when gathering testimony, choices will be made and truths will be partial. The structure of the commission, the choices for testimony, and the framing of the discussions will have a strong impact on the commission's final report.<sup>94</sup>

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89. TRUTH AND RECONCILIATION COMM'N, IV TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 6 (1998).

90. Priscilla Hayner, *Fifteen Truth Commissions: 1974–1994—A Comparative Study*, 16 HUM. RTS. Q. 597, 628–29 (1994); Ensalaco, *supra* note 28, at 660.

91. Hayner, *supra* note 90, at 628–29 (1994); Ensalaco, *supra* note 28, at 660.

92. HAYNER, *supra* note 6, at 61.

93. Weber, *supra* note 45, at 203.

94. Citing Mahmood Mamdani's criticism of the South African TRC's definitions of victim and violation, two scholars have discussed the complicated nature of a mandate's limitations. See Charles

The addition of academic aspects to gathering testimony would ideally simultaneously place the storytelling on a grassroots as well as “elite” level, permeating both in a multiplicity of ways. The work of historians is crucial to the commission proposed here; these experts will lend their skills in investigating archival materials, reading documents, “assessing explanatory hypotheses, and ascribing responsibility.”<sup>95</sup> In the specific context of Israel/Palestine, adding the academic aspects provides a context and framework for the testimony, demonstrating that the commission would seek not to establish a singular historical truth, but rather to comprehend the multiple experiences of 1948 and the significant identity claims that spring from those experiences.

### 3. *Who Will Support It?*

Public participation, civil society cooperation, and popular support are crucial for the success of any truth commission.<sup>96</sup> Two separate, interrelated aspects are relevant: first, popular support for the commission while it takes testimony and proceeds with its work, and second, community and state endorsement of the final report and its recommendations. South Africa represents widespread support for a commission effort; much of the public felt directly engaged in the process, broadly publicized on television and radio, and consistently described the catharsis achieved through the victim testimony.<sup>97</sup> In the years since the TRC’s work finished, South Africans have become frustrated with the lack of progress toward racial and economic equality and disappointed by the failure of the TRC to create national unity, which they expected.<sup>98</sup> Despite these criticisms, the South African TRC is still regarded as successful and viewed as a classic example of local ownership in regime change and peaceful political transition.

El Salvador represents a more ambivalent example. Salvadorans did not initially trust the work of the commission, in part because the leaders negotiated the agreement without public participation. Witnesses eventually came forward when they trusted that they would be protected if they did

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Villa-Vicencio & Wilhelm Verwoerd, *Constructing a Report: Writing up “The Truth,”* in TRUTH v. JUSTICE, *supra* note 10, at 279, 289.

95. Crocker, *supra* note 10, at 101.

96. Although this Note does not discuss Guatemala, the situation there exemplified strong civil society involvement in institutional design. The Guatemala City archdiocese launched its own unofficial Project for the Recovery of Historical Memory, and various groups participated in the negotiations leading to the creation of the official Historical Clarification Commission. *Id.* at 110–11.

97. ALEX BORAINÉ, *A COUNTRY UNMASKED* 99 (2000). Criticism has been advanced, however, of this univalent characterization of the utility of testifying before the TRC. In perhaps the most incisive critique of the TRC’s work, Richard Wilson has problematized the definition and role of victims testifying before the TRC. See RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION* 48–49, 152–53 (2001).

98. Daly & Sarkin, *supra* note 15, at 674; see also WILSON, *supra* note 12, at 227 (discussing the TRC’s failure to complete its nation-building project or create a society that respects human rights).

so.<sup>99</sup> The government ostensibly assisted the commission, as required under the peace accords, but five days after the final report was published, the government passed a general amnesty for all named in the report.<sup>100</sup> The passage of this amnesty law demonstrated an enmity between the commission and the government, an inevitable relationship given the lack of transition in governmental authority after the peace accords. Despite the granting of amnesty and other governmental actions, the combination of the ad hoc and the truth commission's work appears to have overcome state resistance and, in the long run, contributed to institutional change.<sup>101</sup>

In Germany, by contrast, the radical nature of the transition created a significant credibility problem. Critics assert that the German commission guaranteed West Germans a critical history of East German Communist rule, ensuring transition by enforcing a radical break with the past. One German historian writes that the efforts to investigate the East German past

unfolded during 1990-91 as an interrogation in the police sense rather than as anything closer to, say, the South African Truth and Reconciliation Commission. Most crucially of all, the process was managed by using the parliamentary, administrative and judicial machinery of the West German state, rather than being left to East German citizens themselves.<sup>102</sup>

Others argue that the commission allowed previously unimaginable discussions about SED regime abuses to take place in the open, established a historical record, and made concrete recommendations to the unified government.<sup>103</sup> The commission has been criticized, however, for the relative dearth of publicity about its work, particularly its relatively minor impact on the general East German public.<sup>104</sup>

One must ask how the majority of Israeli Jews in particular will be persuaded that a commission of inquiry would be in their interest and would not simply represent a formal condemnation of Israel for its actions in 1948. As one Jewish Israeli interviewee stated:

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99. Buergenthal, *supra* note 18, at 517. Buergenthal points out that the unexpected strength of the ad hoc commission's report helped Salvadorans trust the truth commission process. *Id.* at 516.

100. AMERICAS WATCH, ACCOUNTABILITY AND HUMAN RIGHTS: THE REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR 29 (1993).

101. Democratic elections were held in El Salvador in 1995, signaling the advancement of political participation without constant fear of violence. The Supreme Court was replaced and those who had perpetrated the civil war gradually lost power. Both commissions, however, have left a complicated legacy of unfulfilled promises. See POPKIN, *supra* note 21, at 16, 18-19.

102. Eley, *supra* note 77, at 180-83. Eley concludes that "the Commission refused to approach 'the Communist system as anything less than an undifferentiated evil,'" and that this unrefined account does a disservice to history. *Id.* at 182 (quoting McADAMS, *supra* note 40, at 12).

103. Weber, *supra* note 45, at 227.

104. Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 119 (2001).

I can think of many people for whom, I guess the majority of Jews in Israel, it would be easier for them to give up substantial territory now than to go back to 1948 and to say, let's look at that again, even if it's only for the sake of thinking about it differently, rather than changing the actual results. It's extremely taxing.<sup>105</sup>

In his recent essay describing the possibility of a commission of historical inquiry, sociologist Gershon Shafir overlooks the challenges inherent in securing Israeli participation when he concludes, “[A commission] would be expected to lead to an Israeli apology for its part in the creation of the refugees’ plight, following a divisible approach to past injustice: the issuance of public apologies by the victimizers, or their heirs.”<sup>106</sup>

While this might seem an obvious outcome, to state this as the endpoint of the commission might cause many Israeli Jews to refuse to participate. Shafir focuses on the possibility of a commission of inquiry composed of civil society members, lawyers, historians, educators, and other social scientists.<sup>107</sup> He perhaps assumes that the participating population would self select, limited to those supporting the existence of the commission. However, because the commission is a transitional justice mechanism, broader grassroots support will be crucial to ensure the sustainability of the commission’s findings. Israeli Jews must be persuaded that their participation will result in the final conclusion of the refugee question. Palestinian refugees must believe that the commission will serve their collective and individual interests, and not merely function as another excuse to exclude their voice from the negotiating table.

However, it is unrealistic to expect full grassroots support for the construction of the commission in Israel/Palestine. Partial support, with attention paid to preventing spoilers from obstructing the process, may be the best that can be expected at this stage. While Israelis may worry that they will be forced to admit original sin by their state, Palestinians may fear that a commission will act as a placatory device meant to obstruct their claims for a legal right of return and for material compensation.<sup>108</sup> Such a commission cannot function unless both Israelis and Palestinians trust its purpose and commissioners. The existential import of the discussion about 1948 can only be addressed when both nations are confident that their words will not be used to destroy them. The space could be made “safe” for Israeli Jews if it were part of the larger discussion of a two-state solution. Ideally, the cathartic process of testifying, the exposure of each side to the stories of the other from 1948, and the eventual final report would result in both an

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105. Rabinowitz, *supra* note 53.

106. Shafir, *supra* note 50, at 311.

107. *Id.* at 310.

108. Interview with Husam Jubran, Co-Program Manager, Peace and Reconciliation, Holy Land Trust, in Bethlehem (Jan. 12, 2005); Peters, *supra* note 61.

official acknowledgement of Israeli complicity in the suffering of the Palestinian people in 1948 and a validation of the Israeli/Jewish/Zionist experience of 1948.

Finding appropriate individuals to serve as commissioners may prove to be an unusually difficult aspect of the construction process. Unlike in El Salvador, an entirely international staff would undermine the credibility of the commission. Instead, trusted Palestinians and Israelis should serve as commissioners, with at least one international commissioner or chair. The discussion for constituting a commission would have to include a process for nominating and confirming commissioners. Will they be appointed by the U.N., as in El Salvador? Will they be publicly interviewed and questioned, as in South Africa? Will there be an entirely new process, perhaps combining U.N.-appointed internationals with locally nominated nationals? To ensure the credibility of the commission, process will be as important as conclusions.

#### 4. *Economics*

Although scholars investigating the causes of civil war or inter-state conflict have increasingly focused on economic inequality and resource scarcity, economic issues have been under-explored in the context of transitional justice. Issues of socio-economic development and institution-building remain paramount to post-conflict situations.<sup>109</sup> Truth commission literature addresses economic questions in the context of reparations and compensation, but rarely addresses structural violence or profound inequality. In South Africa, a separate arm of the commission addressed issues of reparations, and a separate court has been set up to adjudicate land claims.<sup>110</sup> One of the gravest critiques of the TRC has been its incapacity or unwillingness to fully address the nature of apartheid as an economic system in addition to a racist ideology, “obscur[ing] the link between perpetrator and beneficiary.”<sup>111</sup> Although debate continues over how commissions may appropriately address economic issues, economic questions should be included both in discussion regarding institutional design and in the mechanism itself.

Assuming a two-state solution, the commission must address the radical inequality between Israel—with its fully functional state and developed economic infrastructure—and a nascent Palestinian state with a developing economy. Addressing only historical or political concerns will merely postpone an inevitable eruption of anger about economic inequality. Addressing the refugee question from an economic perspective requires examining the international law on reparations and considering innovative compensation

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109. See generally PAUL COLLIER ET AL., *BREAKING THE CONFLICT TRAP: CIVIL WAR AND DEVELOPMENT POLICY* 51-118 (2003).

110. See Land Claims Court of South Africa, <http://www.law.wits.ac.za/lcc> (last visited Mar. 7, 2007).

111. Mamdani, *supra* note 33, at 179.

packages that may combine the truth-seeking aspects of truth commissions with the material needs of the refugees.

Although some level of discussion about the refugees may have to occur at the elite level of official negotiations, an advantage of establishing a compensation and reparations commission arm would be its direct connection to the refugees. However, if negotiation over each refugee must be determined through the commission's compensation arm, it will likely take too long, distract from the central purposes of narrative and acknowledgement, and anger refugees who are compensated rather than returned. This Note cannot presume to make a detailed decision that must in the end be negotiated between Israelis and Palestinians; the structural suggestion here, however, is that the compensation aspect of an official commission should integrate the truth-seeking aspects of writing a history of 1948 with the material considerations of caring for the refugee population.

Land remains a central concern, both in the material sense of resource distribution and in the psychosocial sense of historic/ethnic claims to particular territory. Many of these questions trace their origins to 1948. Resource inequity, property ownership, and the relationship of refugees to land should all be considered in the design of the commission.

### 5. *Final Report*

The final report of a truth commission matters to the resolution of a question inasmuch as its history becomes official narrative and its recommendations are heeded or made binding. The production of a final report makes historical resolution possible, and can name the perpetrators and identify the final resting places and fates of victims. The German report was released in late 1994 and is over 15,000 pages (eighteen volumes) long. It includes all the papers presented in the course of the historical inquiry and all of the recorded testimony.<sup>112</sup> In South Africa, where the TRC's report has been put onto a CD-ROM for educational purposes, the final report created an archive of living testimony to overcome doubts about the history of apartheid.<sup>113</sup> In El Salvador, the final report recorded incidents that had been widely acknowledged—for example, the murder of six Jesuit priests—but had not yet been officially investigated and reported.<sup>114</sup>

As the aim of a commission for Israel/Palestine is primarily a nominal agreement about key events, rather than reconciliation, the final report should both make recommendations and create a historical description of the time period investigated. Recommendations might include compensa-

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112. HAYNER, *supra* note 6, at 62.

113. The TRC report was not made as widely available as many connected with the commission wished. Efforts are now underway to increase the accessibility of the TRC website and report. Conversations with Charles Villa-Vicencio, former head of the TRC Research Unit, TRC, and Fanie du Toit, Programme Manager, Institute for Justice and Reconciliation, in Cape Town (Oct. 24–25, 2006).

114. Commission on the Truth for El Salvador, *supra* note 24.

tion packages, proposals for economic and political cooperation between the two populations, governmental reform, educational programs, or any number of other innovative responses to the testimony heard at the commission. Recommendations made by a recent position paper about reconciliation within Israel between Jews and Palestinians included creating a memorial day for the *Naqba*, commemorating the lost Palestinian villages of 1948, legislating financial compensation, and teaching Palestinian history in the mainstream curriculum, suggesting many symbolic reparative measures that might be recommended by a commission of inquiry.<sup>115</sup>

The historical/academic aspect is important as it helps form a bridging narrative and supports the personal narratives and testimony involved. Although there is a degree of cognitive dissonance in the notion of simultaneously recognizing contradictory histories, the understanding of history as a collection of subjective experiences encourages the teaching of history in a poly-vocal manner rather than presenting the illusion of a unified narrative. As Charles Maier writes, “[A]ny history that has politics or conflict at its core, that seeks to encompass the story of a society or regime—that is, a history that seeks to do justice to the public experience of individuals—must work to achieve such a contrapuntal narrative.”<sup>116</sup> Maier’s discussion relies on past truth commissions that have occurred within one state, yet his observations are particularly relevant for Israel/Palestine, where narratives occur both within and between the two nations.

As a practical manner, a CD-ROM or website is one way to provide teaching materials about the events of 1948 to schools. A CD-ROM might have recorded testimony from the commission and the papers presented at the fora during the commission’s work.<sup>117</sup> Rather than simply using a standard textbook to teach students “the truth,” such materials could complicate the history for students, telling multiple stories to promote better understanding and teach the value of history as a collection of moments that are true to the person that experienced them. As the proposal for the IPHC states:

The outcome of successful integrated history is the respect shown to the human dimensions of the conflict as well as the process of constructing such a narrative, which can serve to promote the

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115. Dan Rabinowitz, et al, *Position Paper 3: Identity and Civic/Cultural Inclusion*, in AFTER THE RIFT: NEW DIRECTIONS FOR GOVERNMENT POLICY TOWARDS THE ARAB POPULATION IN ISRAEL, AN EMERGENCY REPORT BY AN INTER-UNIVERSITY RESEARCH TEAM SUBMITTED TO PRIME MINISTER EHUD BARAK (November 2000) (on file with author).

116. Charles Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in TRUTH v. JUSTICE, *supra* note 10, at 261, 275.

117. In addition to the website maintained by the TRC, the University of Witwatersrand maintains a collection of academic papers regarding the Commission. Traces of Truth—The South African TRC, <http://truth.www.wits.ac.za> (last visited Mar. 7, 2007).

willingness of the current generation to overcome the legacy of historical conflict.<sup>118</sup>

Ideally, a commission would harmonize the varying accounts of 1948 and stimulate an Israeli apology for complicity in the experience of Palestinians. However, the naïve expectation of a fully unified history could set a standard so high that it impedes the commission's work. "Reconciliation . . . does not require writing a joint consensual history, but it does require admitting the other's truth into one's own narrative."<sup>119</sup>

The report of a commission and the educational materials it might engender should build on, rather than substitute for, the courageous integrative work that continues to be accomplished by Israeli and Palestinian scholars. The work of historians who have attempted to bridge narrative gaps,<sup>120</sup> textbooks that have offered innovative ways of teaching controversial and contradictory histories, the commemorations of 1948 conducted by the Israeli non-governmental organization ("NGO") Zochrot,<sup>121</sup> and oral history or other scholarship that has incorporated the voices of those affected by the events of 1948 and after,<sup>122</sup> should all be understood to contribute to the structure promoted in this Note.

#### CONCLUSION

New discussions quietly occurring at the grassroots and academic levels make clear that transitional justice models are increasingly applicable to Israel/Palestine. Over two decades since the earliest truth commissions, and more than ten years since the South African TRC opened its doors, Israelis and Palestinians may learn from the successes and failures of past truth-seeking mechanisms. The growth of dialogue groups among individuals and small-scale working groups of academics exploring the questions surrounding 1948 and the refugee population are laying the groundwork for a

118. Doumani & Shafir, *supra* note 66, at 3.

119. Kelman, *supra* note 56, at 123.

120. See generally BENNY MORRIS, 1948 AND AFTER: ISRAEL AND THE PALESTINIANS (1990) and THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED (2003). See also ANN LESCH & DAN TSCHIRGI, ORIGINS AND DEVELOPMENT OF THE ARAB-ISRAELI CONFLICT (1998); Nur Musalha, *A Critique on Benny Morris*, in THE ISRAEL/PALESTINE QUESTION (Ilan Pappé ed., 1999); AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD (2000). For an exchange between two of the Israeli "New Historians," see Benny Morris, *Peace? No Chance*, GUARDIAN (London), Feb. 21, 2002, at 2; Avi Shlaim, *A Betrayal of History*, GUARDIAN (London), Feb. 22, 2002, at 4.

121. Zochrot places signs in Hebrew at the sites of Palestinian villages destroyed in 1948, commemorating their loss. "Physically marking these villages and holding public discussions on the Palestinian Nakba may encourage a more ethical discourse and . . . is intended to set in motion a process of catharsis within the Jewish public . . ." Eltan Bronstein, Position Paper on Posting Signs at the Sites of Demolished Palestinian Villages, <http://www.zochrot.org/index.php?id=343> (last visited Mar. 7, 2007).

122. The Palestinian NGO SHAML has pioneered a project to record Palestinian collective memory by gathering Palestinian oral histories. See Palestinian Oral History Project, <http://www.shaml.org/projects/research/palestinian%20oral%20history%20proj.htm> (last visited Mar. 7, 2007).

future commission. In her recently published memoir, Daphna Golan-Agnon states, "The transition [in South Africa] was made possible by the acknowledgement that signing the agreement would mark not the end of the conflict but rather the beginning of a process of reconciliation and dialogue."<sup>123</sup>

Neither Israelis nor Palestinians can afford to ignore the mistakes of Oslo or to give up on the possibility of peace. The proposal to reconcile the two populations is not utopian; it is necessary. These two nations share territory, resources, and a vast history, regardless of whether they eventually share a state. Each deeply fears loss of legitimacy if it dares to verify the claims of the other and admit its own transgressions. Yet without this mutual declaration of responsibility, complicity, and legitimacy, neither will be able to resolve the issues that drive them apart. Just as we cannot expect negotiators to make deals without understanding their counterparts' positions, we cannot expect citizens to forsake violence and anger without comprehending their own mistakes and seeing their enemy admit to its own faults.

To analogize Israel/Palestine to other conflicts has always been dangerous and politically charged; the problems of the area are unique to the particular history of the peoples and the specific events they have endured. Assuming that no comparison can productively be made, however, or that no precedents can be applied to this conflict, leads to the trap of exceptionalism, which only perpetuates the violence. Comparisons are worthwhile in terms of lessons learned and best practices understood. One of the strongest lessons learned from past commissions has been that their strength lies in the diversity and flexibility of the model. In Israel/Palestine, any transitional justice mechanism must be organically developed, yet internationally guided. Without international assistance, such a commission is unlikely to come to fruition. Without local ownership, any efforts at seeking truth, examining justice, or writing history will again be lost to the continuing morass of the conflict, and the history written will once again be a polarized version of truth.

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123. DAPHNA GOLAN-AGNON, *NEXT YEAR IN JERUSALEM* 249 (2002).